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### Appropriate Action

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# Appropriate Action

Cynthia Gray

Each year, there are judicial discipline cases that illustrate the adverse effect of mental disorders on individual judges and the judiciary.<sup>1</sup> These proceedings also demonstrate the need for the judiciary to address judges' wellness issues sooner, when remediation may be possible, rather than later, when removal may be unavoidable.

*The Path to Lawyer Well-Being: Practical Recommendations for Positive Change*, released by the National Task Force on Lawyer Well-Being in 2017,<sup>2</sup> included several recommendations specifically for the judiciary:

- Communicate that well-being is a priority;
- Develop policies for impaired judges;
- Reduce the stigma of mental health and substance use disorders;
- Conduct judicial well-being surveys;
- Provide well-being programming for judges and staff; and
- Monitor lawyers' performance for signs of impairment and partner with lawyer assistance programs.

The report referred approvingly to Rule 2.14 of the *Model Code of Judicial Conduct*, added in 2007 by the American Bar Association to encourage "judges to address impairment problems when they arise." It provides:

A judge having a reasonable belief that the performance of a lawyer or another judge is impaired by drugs or alcohol, or by a mental, emotional, or physical condition, shall take appropriate action, which may include a confidential referral to a lawyer or judicial assistance program.

Approximately 25 states have adopted the rule and comments with little or no change.

Comments explain that "appropriate action" is "action intended and reasonably likely to help the judge or lawyer in question address the problem and prevent harm to the justice system." What action is "appropriate" depends on the circumstances, but the code lists as examples:

- "Speaking directly to the impaired person";
- "Notifying an individual with supervisory responsibility over the impaired person"; or
- "Making a referral to an assistance program."

Thus, the code requires action by a judge in response to evidence that a colleague or attorney has a disorder but does not necessarily require reporting to a conduct commission, at least not as a first option. However, comment 2 emphasizes that, although "referral to an assistance program may satisfy a judge's responsibility," if the conduct is sufficiently grave, "the judge may be required to take other action, such as reporting the impaired judge or lawyer to the appropriate authority, agency, or body."

The task force report also recommended that courts consider adopting policies such as a diversion rule for judges and ensure that judges "feel comfortable referring members to judicial or lawyer assistance programs." Such efforts in some states may provide the basis for more systematic, transparent, and widespread practices.

Several judicial conduct commissions have express authority to enter into an agreement with a judge to defer formal disciplinary proceedings pending "specified rehabilitation, treatment, education or minor corrective action," as the Nevada statute governing the Commission on Judicial Discipline provides, for example.<sup>3</sup> The Pennsylvania Judicial Conduct Board has adopted special procedures "to encourage affected members of the judiciary to seek help at the earliest possible moment so as to ensure maximum protection to the public against misconduct resulting from their impairment."<sup>4</sup> The policy allows a judicial officer to "petition the Board for permission to enter a rehabilitative diversion program" before the filing of formal charges.

Reliance on assistance programs as corrective action or a mitigating factor can be found in many judicial discipline cases. For example, the Ohio Supreme Court suspended a judge for two years for a demeaning attitude toward counsel and litigants in two matters but stayed the suspension on the condition that he commit no further misconduct and comply with a contract with the Ohio Lawyer Assistance Program (OLAP).<sup>5</sup> The Court credited the judge for his commitment to a course of psychological and psychiatric treatment designed to control his anger, stress, and anxieties and his decision to enter into a four-year OLAP contract.

Most if not all lawyers assistance programs provide services for judges as well as lawyers; for example, the Texas Lawyer Assistance Program states that it "helps judges with issues related to substance use or mental health disorders and maintains a list of volunteer judges who are interested in providing support to peers in crisis." Indeed, at least seven lawyer assistance programs include "judges" in their name. In February

## Footnotes

1. See, e.g., *In re Turner*, Order (Illinois Courts Commission December 1, 2017) (<https://tinyurl.com/y8wn3k89>) (retirement of judge found mentally unable to perform her duties due to Alzheimer's after news reports that the judge had allowed a person who was not elected or sworn in as a judge to preside over matters).
2. <https://tinyurl.com/y9etefcz>. The task force was established by the American Bar Association Commission on Lawyer Assistance Pro-

grams, the National Organization of Bar Counsel, and the Association of Professional Responsibility Lawyers.

3. NRS 1.468 (<https://tinyurl.com/ybuc6t29>).
4. Chapter 11, Pennsylvania Judicial Conduct Board Rules of Procedure (<https://tinyurl.com/y9y4qljj>).
5. *Disciplinary Counsel v. Weithman*, 34 N.E.3d 865 (Ohio 2015).

2017, in West Virginia, where not all judges are lawyers, the Supreme Court of Appeals amended the assistance program's rules "to incorporate confidential assistance" to all judges, as well as lawyers, law students, and bar applicants.<sup>6</sup>

The Kansas Supreme Court has created a separate seven-judge Judges Assistance Committee to provide assistance to any Kansas judge who has a mental or physical disability or an addiction to or excessive use of drugs or intoxicants" by developing a program that "will generate confidence to warrant early referrals and self-referrals to the committee so that impairments may be avoided, limited, or reversed." <sup>7</sup> The objectives of the committee, whose work is usually confidential, include intervention, recommending treatment, providing "a program of peer support, acting as an advocate of judges," and educating the public and the legal community. A judge may communicate with the committee on his or her own behalf, any person may suggest the need to intervene on a judge's behalf, and the Commission on Judicial Qualifications may refer a judge to the committee. The committee may refer a judge to the Commission if "the judge fails or refuses to address the issues of concern."

Anticipating an impairment issue by having processes in place demonstrates a judiciary's commitment to the wellness of its members that not only benefits individual judges, the judicial community, and the public it serves but also prevents confidence-eroding conduct and headlines.



Since October 1990, Cynthia Gray has been director of the Center for Judicial Ethics, a national clearinghouse for information about judicial ethics and discipline that is part of the National Center for State Courts. (The CJE was part of the American Judicature Society before that organization's October 2014 dissolution.)

She summarizes recent cases and advisory opinions, answers requests for information about judicial conduct, writes a weekly blog (at [www.ncscjudicialethicsblog.org](http://www.ncscjudicialethicsblog.org)), writes and edits the Judicial Conduct Reporter, and organizes the biennial National College on Judicial Conduct and Ethics. She has made numerous presentations at judicial-education programs and written numerous articles and publications on judicial-ethics topics. A 1980 graduate of the Northwestern University School of Law, Gray clerked for Judge Hubert L. Will of the United States District Court of the Northern District of Illinois for two years and was a litigation attorney in two private law firms for eight years.

6. <https://www.wvbar.org/wv-lawyers-assistance-program-website/>.

7. Rule 640, Kansas Supreme Court Rules (<https://tinyurl.com/ycu57m3k>).



## PROPOSED BYLAW AMENDMENT

This AJA Bylaws amendment proposal has been submitted by the Bylaws Committee for consideration at the AJA Annual Conference in Hawaii this September. The proposed change is shown as a strikethrough.

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(b) President-Elect. The President-Elect shall:

In the absence, incapacity or illness of the President, either as certified by a majority vote of the Executive Committee or upon the written request of the President, preside at meetings of the General Assembly, Board of Governors and/or Executive Committee. The duration of these duties shall be specified either in the President's written request or by the Executive Committee.

Perform such administrative functions as may be directed by the President and/or the Board of Governors.

Assist the President in facilitating and coordinating the activities of the Association committees.

~~Serve as chairperson of the Conference Committee.~~